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The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte KEITH HOMER BAKER, MICHAEL PETER SIKLOSI,
HENRY CHENG NA, JANINE MORGENS STRANG,
DONNA JEAN HAEGGBERG, WILLIAM MICHAEL SCHEPER,
CONNIE LYNN SHEETS, FERNANDO RAY TOLLENS,
MICHAEL GLEN MURRAY, MICHAEL TIMOTHY CREEDON,
ERROL HOFFMAN WAHL, TOAN TRINH,
EUGENE STEVEN SADLOWSKI, and VINCENT JOHN BECKS

Appeal 2009-010458
Application 10/671,969
Technology Center 1700

Before BRADLEY R. GARRIS, CHARLES F. WARREN, and
TERRY J. OWENS, *Administrative Patent Judges*.

GARRIS, *Administrative Patent Judge*.

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

Appellants appeal under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 76, 83-93, and 119. We have jurisdiction under 35 U.S.C. § 6.

We AFFIRM.

Appellants claim a method for treating shoes made from natural leather comprising contacting the shoes with a treating composition "formulated to deliver an effective level of a calcium/magnesium removal agent without removing significant levels of chromium from the natural leather so that any damage as a result of washing the . . . shoes with or in an aqueous medium with application of the treating composition is reduced" (claim 76).

Representative claim 76, the sole independent claim on appeal, reads as follows:

76. A method for treating one or more shoes comprising at least one surface made from a natural leather, the method comprising contacting the one or more shoes directly or indirectly with one or more treating compositions, each of which comprises one or more benefit agents that imparts one or more desired benefits to the one or more shoes when the treating composition is applied directly or indirectly to the one or more shoes prior to and/or during and/or after washing the one or more shoes with or in an aqueous medium, wherein said treating composition is formulated to deliver an effective level of a calcium/magnesium removal agent without removing significant levels of chromium from the natural leather so that any damage as a result of washing the one or more shoes with or in an aqueous medium with application of the treating composition is reduced compared to washing the one or more shoes with or in an aqueous medium without application of the treating composition.

The Examiner rejects all appealed claims under 35 U.S.C. § 103 (a) as being unpatentable over Watanabe (JP 10276961 A, as translated, pub. Oct.

20, 1998) in view of Ishikawa (US 5,306,435, issued Apr. 26, 1994) and Wu (CN 1052685A, translation of title only, Jan. 11, 1991).

The Examiner also rejects dependent claims 85, 90-92, and 119 under 35 U.S.C. §103 (a) as being unpatentable over Watanabe in view of Yoshioka (JP 09271597, as translated, pub. Oct. 21, 1997).

The arguments on appeal are directed to the requirements of independent claim 76 (Br. 6-13). Appellants do not separately argue the dependent claims including the separately rejected dependent claims (Br. 14-15). Accordingly, we focus on claim 76 in our disposition of this appeal.

In rejecting claim 76, the Examiner relies on Ishikawa and Wu as evidence that Watanabe's shoe leather contains chromium and that Watanabe's detergent contains a calcium/magnesium removal agent (Ans. 5-6). Appellants do not dispute this aspect of the Examiner's rejection (Br. 10-11). As a consequence, we need not further discuss the Ishikawa and Wu references in this opinion.

The Examiner finds that Watanabe discloses a method of washing shoes without damaging the shoes comprising contacting the shoes with a detergent which contains surfactant and other ingredients (Ans. 3-4). As indicated above, the Examiner makes the undisputed finding that Watanabe's detergent contains calcium/magnesium removal agent (*id.*). Because the method of Watanabe does not damage leather shoes, the Examiner finds that Watanabe's detergent inherently performs the claim 76 function of delivering "an effective level of a calcium/magnesium removal agent without removing significant levels of chromium from the natural leather so that any damage as a result of washing the one or more shoes . . . is reduced" (*id.* at 4, 9).

Appellants argue that "[t]he Examiner makes a reaching, unsupported and therefore improper stipulation that since Watanabe claims that his methods 'do not damage shoes,' the detergents employed in the Watanabe methods must therefore remove Ca and Mg ions without removing Cr ions from the leather portion of shoes" (Br. 7).

This argument is unpersuasive.

As a matter of clarification and contrary to Appellants' argument, the Examiner does not find that the Watanabe method removes Ca and Mg ions "without removing Cr ions" (*id.*), nor does claim 76 contain any such requirement. Rather, as indicated above, the Examiner finds that the method of Watanabe inherently performs the claim 76 function of delivering an effective level of a calcium/magnesium removal agent "without removing significant levels of chromium" (claim 76; emphasis added).

Moreover, Appellants' characterization of the Examiner's finding as unsupported is not well taken. This finding is supported by a number of facts.

Notwithstanding Appellants' disagreement, the finding necessarily is supported by the fact that Watanabe's disclosed method and Appellants' claimed method achieve the same result of reduced or no shoe damage. Reinforcing this support is the fact that claim 76 disallows removing only "significant levels" of chromium, wherein the claim indicates that "significant levels" of removed chromium are those which result in shoe damage.

This finding also is supported by the fact that the detergent of Watanabe contains ingredients such as surfactant which correspond to the broadly disclosed ingredients of Appellants' treating composition (*see*

Specification 15-25 (calcium/magnesium removal agents including surfactants), 25-47 (surfactants generally)).

The Examiner's finding is further supported by the fact, acknowledged by Appellants (Br. para. bridging 8-9, 9 first full para.), that Watanabe's method is practiced in a short time period such that "it becomes possible to complete the work before the detergent permeates into the core of the shoes and does not cause loss of shape or damage to the shoes, enabling the washing of leather shoes, which had been considered to be impossible, without causing loss of shape and damaging the leather" (Watanabe, para. [0018]). That is, because Watanabe's detergent does not permeate into the core of the shoes, it is reasonable to believe that the detergent would be incapable of removing chromium contained in the core of the shoes.

For the above stated reasons, the appeal record supports the Examiner's finding that the detergent of Watanabe inherently performs the claim 76 function of delivering "an effective level of a calcium/magnesium removal agent without removing significant levels of chromium from the natural leather so that any damage as a result of washing the one or more shoes . . . is reduced".

Where the Patent [and Trademark] Office has reason to believe that a functional limitation asserted to be critical for establishing novelty in the claimed subject matter may, in fact, be an inherent characteristic of the prior art, it possesses the authority to require the applicant to prove that the subject matter shown to be in the prior art does not possess the characteristic relied on.

In re Schreiber, 128 F.3d 1473, 1478 (Fed. Cir. 1997), quoting *In re Swinehart*, 439 F. 2d 210, 213 (CCPA 1971). See also *In re Best*, 562 F. 2d 1252, 1255 (CCPA 1977) (whether the rejection is under § 102 or § 103, the

burden of proof is the same, and its fairness is evidenced by the inability of the Patent and Trademark Office to obtain and compare claimed and prior art subject matter).

Under the circumstances of this appeal, we determine that it is Appellants' burden to prove that Watanabe is not actually capable of inherently performing the above-discussed function required by claim 76. Appellants have submitted no such proof in the appeal record.

We sustain, therefore, the Examiner's §103 rejections of the appealed claims.

The decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a) (2008).

AFFIRMED

Ssl

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